[Cite as *State v. Huber*, 2010-Ohio-5598.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94382

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH HUBER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526296-B

BEFORE: Celebrezze, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: November 18, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Joseph Huber, appeals his convictions and sentence. Based on our review of the record and apposite case law, we affirm. The relevant facts follow.

{¶ 2} On February 23, 2009, Theodore Sliwa lived alone in the upstairs unit of a two-family home. At approximately 9:00 p.m, he heard someone at his door. Sliwa asked who was at the door but heard no response. Two men, one tall and one short, shoved their way inside Sliwa's home. The men grabbed Sliwa, and the taller man, later identified as appellant, forced Sliwa into a kitchen

chair. Throughout the event, the shorter man was hitting Sliwa in the back with a sharp object. Appellant punched Sliwa in the face at least twice and asked Sliwa where his billfold was. Sliwa informed appellant that the billfold could be found in his coat, which was hanging in the living room closet. Appellant took the money out of Sliwa's billfold and then asked where Sliwa's car keys were. Sliwa gave appellant the keys to his Chevrolet, and the men left.

{¶ 3} Appellant initiated an interview with Detective Moran with the Cleveland Police Department. During this interview, appellant admitted his involvement in the incident at Sliwa's home. According to appellant, however, he knew his son was going to rob Sliwa, and he entered the home only to make sure his son did not harm Sliwa. Appellant admitted to asking for Sliwa's billfold and taking his money, but claimed that when he left Sliwa's apartment, Sliwa was unharmed. Appellant then told Detective Moran that he was at his mother's house, which is on the same block as Sliwa's, when his son returned and claimed to have stabbed Sliwa. According to appellant, his son threw the knife he used over a hill behind appellant's mother's house. This knife was never recovered. Appellant also claimed that his son took Sliwa's car keys and that appellant was never in Sliwa's vehicle.

{¶ 4} Jacob and Mary Corrigan testified to an event that occurred on February 27, 2009. That evening, Jacob attended an extracurricular activity at St. Ignatius High School, and Mary, his mother, arrived to pick him up at approximately 11:00 p.m. On their way home, the Corrigans stopped at a Rite

Aid store. Mary told Jacob he could stay in the car and she would leave it running, but asked him to lock the doors. Jacob, who was sitting in the passenger seat, did not lock the doors and was sitting in the car texting and listening to music when he noticed a man walk by his window. The same man knocked on the driver's side window and asked Jacob for change for a five dollar bill. When Jacob said no, the man opened the driver's side door and got in the car. Jacob attempted to take the keys out of the ignition when another man opened the passenger side door. The second man attempted to confiscate Jacob's cell phone, but Jacob managed to put the phone in his pocket. Jacob testified that the second man then got in the vehicle's back seat.

{¶ 5} The second man left Jacob's door open when he got into the back seat. The man in the driver's seat put the car in reverse and began pulling out of the parking lot, while the second man began choking Jacob from behind. Jacob somehow managed to free himself from the man's grasp, grabbed hold of the passenger's seat, and slid out of the car and onto the ground. He ran inside the store and informed Mary of what had happened. A Rite Aid employee contacted the police, who came and took statements from Mary and Jacob.

{¶ 6} Mary testified that she noticed two men sitting on a bench just outside of the Rite Aid's doors when she entered. Although she was unable to see the man sitting farther away from her, she identified appellant's son from a photo array as the man sitting closest to her. Jacob was also shown a photo lineup and identified appellant as the man who got into the vehicle's driver's seat

that evening. The Corrigan's 2008 Hyundai Sante Fe was recovered a few hours later. Appellant also confessed to this crime in his recorded interview with Detective Moran.

{¶ 7} Appellant was indicted in a 15-count indictment on two counts of aggravated burglary, four counts of aggravated robbery, two counts of kidnapping, one count of attempted murder, four counts of felonious assault, and two counts of theft. Appellant pled not guilty, and the matter proceeded to a jury trial. At the close of the state's case-in-chief, pursuant to Crim.R. 29, the trial court dismissed the attempted murder count. The judge also dismissed one count of aggravated robbery and one count of felonious assault, both of which related to the Rite Aid event.

{¶ 8} Appellant was found guilt of aggravated burglary[1] related to the Sliwa event and two counts of theft of a motor vehicle.[2] He was sentenced to 10 years for aggravated burglary, to run consecutively to three years for the repeat violent offender specification. He was sentenced to 18 months for each count of theft, to run concurrently to one another but consecutively to the aggravated burglary count, for a total of 14 and one-half years in prison. This sentence was ordered to run consecutively to the sentence imposed in CR-521813, for an aggregate sentence of 29 and one-half years in prison. This appeal followed.

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[1]R.C. 2911.11(A)(1), a first-degree felony. Appellant stipulated to a notice of prior conviction and a repeat violent offender specification on this count.

[2]R.C. 2913.02(A)(1), fourth-degree felonies.

{¶ 9} Appellant argues that 1) the trial court erred in denying his motion to sever, 2) the trial court erred in denying his motion to suppress, 3) his conviction was based on insufficient evidence and was against the manifest weight of the evidence, 4) his sentence is contrary to law, 5) the trial court erred in failing to make findings as to why his sentences should run consecutively to each other, and 6) his prior conviction involved a void sentence and thus could not precipitate a repeat violent offender specification.

Law and Analysis

Motion to Sever

{¶ 10} In his first assignment of error, appellant argues that the trial court erred in denying his motion to sever. Crim.R. 8(A) provides that two or more offenses may be charged in the same indictment if they "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." If, however, the state or the defendant feel they will be prejudiced by the joinder, they can file a motion to sever pursuant to Crim.R. 14.

{¶ 11} "To prevail on a claim that the trial court erred in denying a motion to sever, the defendant must affirmatively demonstrate (1) that his or her rights were prejudiced; (2) that at the time of the motion to sever, the defendant provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial; and (3) that given the

information provided to the court, it abused its discretion in refusing to separate the charges for trial." *State v. Johnson*, Cuyahoga App. No. 88372, 2007-Ohio-2501, ¶38. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 12} Appellant's motion to sever focused predominantly on the joinder of his case with that of his son. We note that appellant's son entered a guilty plea, and thus the only issue remaining was whether the court was required to order separate trials for the Rite Aid and Sliwa events. Appellant made a general argument in his motion to dismiss that he would be prejudiced if the two incidents were tried together. He argued that, "although contained in only one indictment, CR-526296, is actually two separate incidents as it pertains to Mr. Huber. The first occurred on February 26, 2009 and involved a home invasion with the victim Theodore Sliwa. The second occurred on February 28, 2009, which was a car jacking of the victim Jacob Corrigan. The two cases have nothing in common other than the defendants. Trying them together will cause immense prejudice in violation of Crim.R. 14."

{¶ 13} Appellant has not met the three-pronged test set forth in *Johnson*. First, appellant is unable to demonstrate that his rights were prejudiced by the trial court's denial of his motion to sever. The evidence at trial was unequivocal and established that appellant participated with his son in the burglary related to Sliwa and in stealing the Corrigan's vehicle. Also, appellant's motion to sever

did not provide the trial court with any real reason why denying the motion to sever would affect his right to a fair trial.

{¶ 14} Severance is not required when the evidence related to each crime is simple and direct. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶96. In this case, the evidence related to each crime consisted of appellant's confession and the testimony of the victims. Appellant has not argued, nor could he establish, that the evidence was anything other than clear and straightforward. Appellant's argument that the only commonality between the two crimes was him is misguided. The evidence demonstrated that appellant and his son were both active participants in the crimes charged. This evidence was sufficient to demonstrate a pattern of criminal activity, and thus the cases had commonalities beyond the mere presence of appellant.

{¶ 15} We are unwilling to assume that the jury was unable to sift through the victims' testimony and determine whether appellant was guilty of each crime. Our decision in this regard is bolstered by the fact that the jury acquitted appellant of nine charges. Appellant failed to articulate any plausible reason why he was prejudiced by the joinder of these offenses. As such, we cannot find that the trial judge abused his discretion in denying appellant's motion to sever. Appellant's first assignment of error is overruled.

Motion to Suppress

{¶ 16} In his second assignment of error, appellant argues that the trial court erred in denying his motion to suppress the statements he made to

Detective Moran. When considering a trial court's denial of a motion to suppress, this court's standard of review is divided into two parts. In *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913, the court stated, "our standard of review with respect to motions to suppress is whether the trial court's findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9, 11, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802, 804-805. Naturally, this is the appropriate standard because "'[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.'" *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, 339, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831, 833. However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard."

{¶ 17} In his motion to suppress, appellant first argued that Detective Moran failed to completely advise him of his Miranda rights. According to appellant, "Detective Moran glossed over the Miranda warnings leaving out the heart of the warning." This argument lacks merit. We have carefully reviewed the audio recording of appellant's interview with Detective Moran, which reveals that

appellant was completely and accurately informed of his Miranda rights before the interview began.

{¶ 18} Appellant also argued that Detective Moran made an implied promise to him that he would receive some sort of leniency for his statement and that this promise rendered his statement involuntary. In making this argument, appellant misconstrues the statements made by Detective Moran. Appellant initiated the interview. The audio recording reveals that after Detective Moran read appellant his rights, appellant indicated that he could help Detective Moran solve certain crimes, but would only do so in exchange for a guarantee of immunity. Before Detective Moran could respond, appellant began telling Detective Moran the details of various crimes committed by appellant's son.

{¶ 19} Before providing Detective Moran with any incriminating information related to his role in these crimes, appellant again asked for a promise of immunity. Detective Moran responded that he could not make any promises, but did suggest that the crimes be grouped together in a single indictment to increase appellant's chance of a favorable plea deal. Detective Moran then told appellant of a case he had recently been involved in where the defendant was named in a 24-count indictment but pled guilty to only four counts. Appellant then confessed his role in the Sliwa and Rite Aid events. At the end of the interview, Detective Moran told appellant that he would inform the prosecutor's office of appellant's role in solving the crimes committed by appellant and his son.

{¶ 20} According to appellant, Detective Moran's suggestion that appellant might receive a favorable plea deal if the crimes were grouped into a single indictment was an implied promise that rendered his confession involuntary. "In deciding whether the defendant's confession in this case was involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, 40-41, 358 N.E.2d 1051, vacated in part on other grounds *Edwards v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

{¶ 21} The totality of the circumstances leads this court to the conclusion that appellant's confession was freely and voluntarily given. At the beginning of the interview, appellant informed Detective Moran that he had been involved in the criminal justice system for approximately 20 years and knew how the system operated.[3] We have carefully listened to the audio recording of appellant's interview with Detective Moran, and nothing indicates that Detective Moran made any implied promises of leniency in order to facilitate appellant's confession. In fact, Detective Moran expressly informed appellant that he could make no promises, but would inform the prosecutor's office of appellant's assistance in solving the various crimes committed by appellant and his son.

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[3]Appellant has a lengthy criminal record for various offenses.

{¶ 22} In *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, the police told the defendant that he should offer his side of the story before his co-defendant, but if the co-defendant cut a deal, "it's kinda like a bus leaving. The first one that gets on is the only one that gets on." Id. at ¶27. The trial court placed significance on this bus analogy and determined that it was an implied promise that rendered the defendant's confession involuntary. Id. at ¶28. The Court in *Dixon* noted that "a promise made by a police officer is merely one factor to consider along with other circumstances in determining whether a defendant's statement was voluntary. It does not matter that the accused confessed in response to the promise so long as the promise did not overwhelm his will." (Internal citations omitted.) Id.

{¶ 23} As in *Dixon*, any impact Detective Moran's "suggestion" had on appellant's confession is purely speculative. Appellant did not testify at the suppression hearing, nor did he offer any evidence that his statement was involuntary. Appellant admitted that he had been involved in the criminal justice system for approximately 20 years and was well aware of how the system worked. Based on this statement and the fact that Detective Moran unequivocally told appellant that no promises could be made, we cannot find that appellant's incriminating statements were the result of improper police coercion. Appellant's second assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 24} In his third and fourth assignments of error, appellant argues that there was insufficient evidence to support his convictions and his convictions are against the manifest weight of the evidence. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 25} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin*

court stated that "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 175.

{¶ 26} Appellant was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1), which prohibits an individual from using force to trespass in an occupied structure when an individual, other than the offender or his accomplice, is present, with the purpose to commit a criminal offense if he inflicts, attempts, or threatens to inflict physical harm on another. Appellant was also convicted of theft in violation of R.C. 2913.02(A)(1), which prohibits an offender from knowingly obtaining or exerting control over the property of another without the owner's consent and with the purpose of depriving the owner of that property. The jury also found that the property stolen in both instances was a motor vehicle, elevating appellant's theft convictions to fourth-degree felonies. R.C. 2913.02(B)(5).

{¶ 27} The evidence presented at trial showed that appellant and his son forced their way into Sliwa's apartment, held him down, assaulted him, and took his cash and car keys. The evidence also showed that Sliwa's vehicle was removed from his garage and was discovered in a junk yard a couple of days later. This evidence, which was believed by the jury, was sufficient to find appellant guilty of both aggravated burglary and theft of a motor vehicle.

{¶ 28} In his recorded confession, appellant claimed that he played a minimal role in the event that occurred in Sliwa's apartment. According to appellant, he only entered Sliwa's home after his son had forced his way inside and did so only because he feared his son would harm Sliwa. Appellant claimed he did not physically harm Sliwa in any way; he merely asked where the billfold was, took the money, and left. Appellant further claimed that his son was the individual who demanded the car keys and that appellant was unaware that his son intended to take Sliwa's car. According to appellant, he did not take Sliwa's vehicle and did not know the vehicle was stolen until he saw his son later that evening.

{¶ 29} Despite this conflicting evidence, the jury found appellant guilty of theft of a motor vehicle. It is not within our purview to step into the jury's shoes and find otherwise. The jury heard all of the evidence and obviously found Sliwa's testimony to be more credible than appellant's recorded confession. This decision was entirely up to the jury, and we cannot find that the jury lost its way in rendering its decision.

{¶ 30} Appellant was also convicted of theft of a motor vehicle with regard to the Rite Aid incident. The evidence at trial, which consisted of appellant's recorded confession and the testimony of both Jacob and Mary Corrigan, showed that appellant and his son drove off in the Corrigan's Hyundai Sante Fe without the Corrigan's permission. This evidence was sufficient to find appellant guilty of

theft of a motor vehicle. There was no conflicting evidence on this issue; therefore, we cannot find that the jury lost its way.

{¶ 31} After scrupulously reviewing the evidence presented and considering this evidence in a light most favorable to the state, we cannot find that appellant's conviction was based on insufficient evidence. We have also considered all discrepancies in the testimony; however, these discrepancies are not sufficient enough to warrant a new trial in this case. The jury carefully considered the evidence presented, as shown by the fact that appellant was only convicted of three of the counts he was charged with, and we cannot find that the jury clearly lost its way in this case. Appellant's third and fourth assignments of error are overruled.

Sentencing

{¶ 32} Appellant's fifth and sixth assignments of error relate to his sentence. In his fifth assignment of error, he argues that his sentence is excessive in light of the crimes committed. In making this argument, appellant relies on the aggregate sentence received after his sentence in this case was run consecutively to the sentence in CR-521813.

{¶ 33} The Ohio Supreme Court addressed how felony sentences should be reviewed in the aftermath of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶9. Before *Foster*, it was unequivocal that appellate courts applied an abuse of discretion standard when determining

whether a felony sentence was valid. Id., citing former R.C. 2953.08(G)(2). Appellate courts were also authorized to take action if they found that the record did not support the sentence or that the sentence was contrary to law. Id. at ¶10.

{¶ 34} *Foster* made it clear that trial courts are no longer required to engage in judicial fact finding before imposing a sentence. Id. at ¶11. Trial courts now "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, supra, at ¶100.

{¶ 35} The *Kalish* court held that a two-step approach must be applied when determining the validity of a sentence on appeal. Id. at ¶4. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore*, supra.

{¶ 36} In this case, appellant was convicted of aggravated burglary, a first-degree felony carrying a sentence of three to ten years in prison. R.C. 2929.14(A)(1). The trial court sentenced appellant to ten years for

aggravated burglary. Then, relying on appellant's conviction in CR-407661, the court found that appellant was a repeat violent offender and sentenced him to an additional three-year term to run consecutively to the aggravated burglary count. R.C. 2929.14(D) (2)(a)(i). Appellant was also convicted of two counts of theft of a motor vehicle, fourth-degree felonies carrying sentences of six to 18 months in prison. R.C. 2929.14(A)(4). The trial court sentenced him to 18 months for each of these counts and ordered these sentences to run concurrently to one another, but consecutively to the rest of his sentence in this case. This left appellant with an aggregate sentence of 14 and one-half years in prison.

{¶ 37} Appellant has pointed to no evidence demonstrating that the trial court failed to comply with the requisite sentencing statutes or that his sentence was arbitrary, unreasonable, or unconscionable. Since the trial court acted within its broad discretion in sentencing appellant, who admittedly has an extensive criminal history including several terms in prison, we cannot find that the trial court abused its discretion.

{¶ 38} In his sixth assignment of error, appellant argues that according to *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, the trial court erred in failing to make findings of fact when issuing consecutive sentences. According to appellant, *Ice* required the trial court to state its reasons for imposing consecutive sentences. In *State v. Foster*, 109 Ohio

St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100, the Ohio Supreme Court held that trial courts were no longer required to make findings when "imposing maximum, consecutive, or more than the minimum sentences." This court has acknowledged the holding in *Ice*, but we have repeatedly held that until the Ohio Supreme Court overrules its holding in *Foster*, *Foster* remains binding on this court and will be applied. *State v. Cooper*, Cuyahoga App. No. 92911, 2010-Ohio-4106, ¶32.[4]

{¶ 39} Appellant's sentence falls squarely within the statutory range, and appellant is unable to demonstrate that the trial court abused its discretion. This court has consistently refused to disregard *Foster* in light of *Ice* without a clear direction from the Ohio Supreme Court on this issue. As such, appellant's fifth and sixth assignments of error are overruled.

Repeat Violent Offender Specification

{¶ 40} In his seventh assignment of error, appellant argues that CR-407661 could not lawfully precipitate the repeat violent offender specification in the instant case since the sentence in CR-407661 is void and cannot be corrected by the trial court because appellant has already served his sentence in that case.

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[4] This issue is currently pending before the Ohio Supreme Court in *State v. Hodge*, Supreme Court Case Number 2009-1997.

{¶ 41} A review of the record reveals that appellant was not advised of postrelease control when he was sentenced in CR-407661, and thus the sentence in that case is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶16. A void sentence is a legal nullity and should be treated as if it never occurred. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶25. Because a conviction encompasses both a finding of guilt and imposition of a sentence, appellant argues that there was no valid conviction in CR-407661, and therefore CR-407661 could not precipitate a repeat violent offender specification.

{¶ 42} In *Bezak*, the defendant was not properly notified of postrelease control when his sentence was imposed, and thus his sentence was void. Id. at ¶16. Because the defendant in *Bezak* had already served his sentence, the Court held that he could not be resentenced and postrelease control could not be imposed. Id. at ¶18. Appellant relies on this outcome to argue that his sentence cannot be corrected and will remain void; therefore, it is to be ignored and cannot serve as the basis for a repeat violent offender specification. We find that appellant is construing the holdings in *Bezak* and its progeny too narrowly.

{¶ 43} "As a court of law, we must be careful to avoid obtaining results that are absurd or unreasonable whenever possible." *State v. Biondo*, Portage App. No. 2009-P-0009, 2009-Ohio-7005, ¶45. As in the instant case,

the defendant in *Biondo* had already served his sentence when the court realized that the sentence was void. Biondo sought to avoid his obligation to pay mandatory fines and costs by arguing that the void sentence was a legal nullity. The court in *Biondo* rejected this argument and held that "[t]owards this end, the order set forth in *Bezak* implies that a conviction (guilt plus sentence) can withstand a court's determination that a felon was not provided adequate statutory notice of post-release control. Such a conclusion can only be drawn by treating, at the very least, the completion of a term of imprisonment (following a valid finding of guilt), as sufficient to meet the definition of a sentence under the unique circumstances created by the facts in *Bezak* and, by implication, the facts of the case sub judice." *Biondo* at ¶48.

{¶ 44} In *Bezak*, the court noted that, although a sentence imposed without the defendant being advised of postrelease control is ordinarily void, Bezak could not be resentenced because he had already completed his term of imprisonment. *Bezak* at ¶18. It is noteworthy, however, that the court in *Bezak* did not vacate the conviction, but merely remanded the case to the trial court with instructions to note on the record that Bezak had completed his sentence and would not be subject to resentencing. Id. As noted in *Biondo*, this holding "has odd conceptual implications: Bezak's sentence was void and therefore a legal nullity because he was not properly notified of the possibility of post-release control; however, the court made a point to emphasize that he

had already served his sentence. This begs the question: How can one have served a sentence that does not exist? Much like a Zen Koan, such a paradox cannot be resolved by deductively following the concepts which created the entanglement, but must be *dissolved* by following a different course." (Emphasis in original.) *Biondo* at ¶47.

{¶ 45} Numerous complications have resulted from the holdings in *Bezak* and its progeny. It is illogical to presume, however, that the Ohio Supreme Court intended *Bezak* to stand for the proposition that an unchallenged sentence that is technically "void" due to an improper postrelease control advisement cannot then serve as the basis for a repeat violent offender specification, especially in a case such as this where the offender has already completed his prison sentence.

Conclusion

{¶ 46} The trial court did not err in denying appellant's motion to suppress and motion to sever. Ample evidence was presented to support appellant's convictions, and his convictions are not against the manifest weight of the evidence. When an offender completes a prison term that would otherwise be void due to an inadequate postrelease control advisement, that sentence can serve as the basis for a repeat violent offender specification. Finally, the trial court did not err or abuse its discretion when sentencing appellant.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR